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IN THE

Supreme Court of the United States

H.C. BAILEY, JR., ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR AMBASE CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION ADDRESSED BY AMICUS

Under this Court's precedents, the physical seizure of a viable business by the government constitutes a *per se* taking requiring just compensation under the Fifth Amendment. The government physically seized viable businesses owned by petitioners and *amicus*. Has the Federal Circuit erred in categorically refusing to apply the *per se* takings analysis where the business seized is a savings and loan institution?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, AmBase Corporation states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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BRIEF FOR AMBASE CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

AmBase Corporation, as *amicus curiae*, respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTRODUCTION AND INTEREST OF AMICUS

The second question presented by petitioners in this case is whether the Federal Circuit erred in rejecting as a matter of law their claim that the government's seizure of a private business—a savings and loan institution—constituted a taking requiring just compensation under the Fifth Amendment. The government also seized a thrift owned by *amicus*, and the Court of Federal Claims denied its taking claim for reasons similar to those adopted in the decision below. *See AmBase Corp.* v. *United States*, 58 Fed. Cl. 32 (2003).

In 1988, AmBase Corporation purchased all of the outstanding stock of Carteret Bancorp, Inc., the holding company of Carteret Savings Bank, a federally chartered savings and loan association. Before the AmBase acquisition, Carteret had acquired four failing thrifts pursuant to *Winstar*-type contracts with the Federal Savings & Loan Insurance Corporation (FSLIC). *See* 58 Fed. Cl. at 34-37; *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

"Throughout the mid-1980's, Carteret was a healthy and profitable business." 58 Fed. Cl. at 37. It recorded positive net income every year, increased its assets from less than $2 billion to almost $6 billion, and increased its regulatory net worth from $71 million to $321 million. *Ibid.* A significant portion of that net worth was $182 million in supervisory goodwill remaining from Carteret's acquisition of failing thrifts earlier in the decade. *Ibid.* In 1988, AmBase agreed to purchase Carteret for $266 million. *Ibid.*

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) revised many of the rules applicable to thrift institutions, including the calculation of regulatory capital. *See Winstar*, 518 U.S. at 857 (plurality opinion). FIRREA required, among other things, that supervisory goodwill be phased out in no more than five years notwithstanding any preexisting contractual amortization periods. "Given the amount of supervisory goodwill on Carteret's books, Carteret was particularly concerned about FIRREA's provisions that phased out the amount of supervisory goodwill that could be used towards meeting capital requirements." *AmBase*, 58 Fed. Cl. at 38.

In late 1989, AmBase infused $20 million into Carteret; on February 13, 1991, AmBase infused another $30 million into Carteret. 58 Fed. Cl. at 38. "[B]y June of 1991, Carteret had not secured [additional] new capital, and despite the inclusion of supervisory goodwill in regulatory capital, reported to the OTS that it had failed to meet all three minimum capital requirements [under FIRREA]." *Id.* at 39. But "[d]espite Carteret's difficulty in securing new capital, by the end of November of 1992, Carteret had returned to profitability, recording positive net income of $11 million." *Ibid.* Because of the "death spiral" induced by FIRREA, however, the thrift failed to meet the new capital requirements, "and on December 4, 1992, the OTS placed Carteret into conservatorship with the Resolution Trust Corporation [(RTC)]." *Ibid.*

AmBase sued the government for, among other things, taking its property (Carteret) without paying just compensation. The government responded "that the imposition of a conservatorship on a failed thrift is not, and cannot, be a taking." 58 Fed. Cl. at 50. The Court of Federal Claims agreed, stating that "it is well established that the government's seizure and closure of an insolvent bank and the appointment of a receiver to control the bank's assets pursuant to valid federal statutes is not a taking under the Fifth Amendment." *Ibid.* The court further observed that the thrift retained a cause of action for breach of contract, and concluded that, at least in cases involving contractual rights, "the takings claim can only exist if there is no remedy other than a takings claim for the government's breach of contract." *Id.* at 51.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision in this case is the culmination of a series of cases in which that court (and, following its lead, the Court of Federal Claims) has effectively declared the constitutional guarantee of just compensation in the event of a governmental taking inapplicable to an entire sector of the American economy—the regulated financial services industry. The Constitution, however, contains no exception for banks and thrifts, and the Federal Circuit's creation and enforcement of just such an exception cannot be reconciled with this Court's Takings Clause jurisprudence. Review is warranted to ensure that owners of financial institutions are afforded the same Fifth Amendment protection as owners of other types of businesses.

1. The government's physical occupation of private property constitutes a *per se* taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Government-chartered businesses are treated the same as other private property for Takings Clause purposes. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 341 (1893) (the government "can no more take the franchise which the

state has given than it can any private property belonging to an individual"). Thrifts are government-chartered businesses. *Winstar*, 518 U.S. at 844. It should necessarily follow that the government's physical occupation of a thrift business constitutes a *per se* taking. But in the Federal Circuit it does not. That conclusion warrants review by this Court.

a. At least since *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), this Court has drawn a distinction between "regulatory" and "*per se*" takings, reserving the latter category for cases in which the government physically occupies private property. In *Loretto*, for example, the Court held that a law mandating the installation of cable television equipment on private buildings constituted a permanent physical invasion of private property, and thus constituted a *per se* taking requiring just compensation without need to resort to the *ad hoc* factors articulated in *Mahon* and subsequent regulatory taking cases. *See* 458 U.S. at 434-35.

The *Loretto* Court explained that the *per se* rule is warranted for four principal reasons. First, it is dictated by precedent: This Court has always considered physical occupations to be takings. 458 U.S. at 427-35 (citing, *inter alia*, *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166, 181 (1871); *Transportation Co.* v. *Chicago*, 99 U.S. 635, 642 (1879)). Second, this "traditional rule . . . avoids otherwise difficult line-drawing problems," because "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Id.* at 436-37. Third, "the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. And fourth, property owners entertain "a historically rooted expectation of compensation" when the government physically occupies their property. *Ibid.*

This Court has consistently treated the government's seizure of a business as a *per se* taking. *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co.* v.

United States, 338 U.S. 1 (1949); *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280 (1926). In fact, the Court has often cited business seizure cases to *distinguish* such *per se* takings from mere regulatory takings: In *Loretto*, for example, the Court cited *Pewee Coal* as an example of the traditional rule. 458 U.S. at 431-32; *see also Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 & n.18 (2002); *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 331-32 (1987) (Stevens, J., dissenting).

The government physically seized the thrifts formerly owned by petitioners and *amicus*. *See Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1073 (Fed. Cir. 1994) ("when the Comptroller placed the Bank in FDIC receivership there was, in a very real sense, a physical invasion and permanent occupation"). When they were seized, the thrifts were worth millions of dollars.[2] This Court's precedents indicate that these seizures—like the seizure of any business—should be analyzed under the *per se* takings doctrine.

b. The Federal Circuit, however, has concluded that the government's seizure of a particular *type* of business—federally regulated banks and thrifts—can never constitute a *per se* taking. *Bailey* v. *United States*, 341 F.3d 1342, 1347 (Fed. Cir. 2003). The rule applied in the decision below is the result of a series of cases involving compounding errors.

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[2] Today, the thrifts are worth nothing—"not because [the] property vanished into thin air" (*Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)), but because of losses attributable to the government liquidation. *See Pewee Coal*, 341 U.S. at 117-19 (government responsible for post-seizure losses). For this reason, the notion of a "receivership deficit" is irrelevant to a claim for just compensation under the Fifth Amendment. The government is responsible for the value of the property to its owners on the date it was seized, regardless of any subsequent decline in value.

The genesis of the Federal Circuit's flawed approach lies in *American Continental Corp.* v. *United States*, 22 Cl. Ct. 692 (1991), which involved a thrift that was placed into conservatorship after a regulatory finding that it was in an "unsafe and unsound" condition. The thrift challenged the appointment of a conservator, but a district court sustained the regulatory finding. The thrift then brought a separate action under the Takings Clause, which was rejected by the Claims Court. That court held that *Loretto*'s *per se* rule did not apply to thrifts because thrift owners' "expectations as to the operation of [their property] reasonably must have been rooted in the scope of the government's regulatory authority rather than in historical notions of the rights of owners of physical things." *Id.* at 700.

The Federal Circuit adopted the *American Continental* approach in *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955 (Fed. Cir. 1992), which also involved a thrift placed into conservatorship following a regulatory finding that it was unsafe and unsound. The court said that "*Loretto* simply does not fit cases such as this where the historically rooted expectations of ownership that underlie *Loretto* do not exist." *Id.* at 959-60. Those expectations do not exist in the thrift industry, according to the Federal Circuit, because thrift owners "lack[] the fundamental right to exclude the government from [their] property at those times when the government could legally impose a conservatorship or receivership on [the thrift]." *Id.* at 958.

Both *American Continental* and *California Housing* involved thrifts that failed to meet *preexisting* regulatory requirements.[3] The Federal Circuit has subsequently extended

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[3] It is therefore possible that the *holdings* of these early cases were correct: If the government adequately established that the thrifts were seized for failure to comply with rules inherent in their charters, then no just compensation would have been due. But the *reasoning* employed by the Federal Circuit in *California Hous-*

its no-takings rule to cases in which the government seizure was based on a *change* in regulation. *See Golden Pacific*, 15 F.3d at 1072-74 (no *per se* taking despite claim that regulators "reneged" on a prior commitment regarding solvency determinations). In *Branch* v. *United States*, 69 F.3d 1571 (Fed. Cir. 1996), which was the first case in which a takings claim was expressly premised on the changes wrought by FIRREA, the court said only that "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." *Id.* at 1575; *see also Castle* v. *United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002) ("seizure of a bank for failure to meet regulatory capital requirements does not constitute a taking"), *cert. denied*, 123 S. Ct. 2572 (2003).

The decision below, in which the Federal Circuit said only that "[w]e have already rejected the theory that regulatory assessments of liability fall into the category of per se takings" (*Bailey*, 341 F.3d at 1347), thus follows a line of precedent to the same effect. The validity of that line warrants examination by this Court.

2. The Federal Circuit's conclusion that the *Loretto* rule is inapplicable to the banking industry, although variously articulated in the decisions summarized above, ultimately rests on four interrelated grounds: (a) the owners of thrifts and banks do "not possess the most valued property right in the bundle of property rights, the right to exclusive possession, or stated conversely the right to exclude others" (*California Housing*, 959 F.2d at 958); (b) thrift owners have no "historically rooted expectation of compensation" (*ibid.*); (c) banking is a highly regulated industry (*id.* at 959); and (d) thrift owners give up their right to just compensation in ex-

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ing was manifestly incorrect, and has been subsequently adopted as a legal rule supporting the *judgments* in cases arising under very different circumstances, including the decision below.

change for governmental benefits (*ibid.*). Each is squarely contrary to this Court's precedents.

a. With respect to the first point, the Federal Circuit has asserted that bank and thrift owners "lack[] the fundamental right to exclude the government from [their] property *at those times when the government could legally impose a conservatorship or receivership.*" *California Housing*, 959 F.2d at 958 (emphasis added); *see also Golden Pacific*, 15 F.3d at 1074.

The Federal Circuit's reformulation of the *per se* analysis begs the constitutional question. To say that the taking is *authorized* by law says nothing about whether just compensation is due. The cable operators in *Loretto*, after all, were *authorized* to place their equipment on building rooftops; the question was whether the property owners were constitutionally entitled to just compensation based on the exercise of that authority. *See Loretto*, 458 U.S. at 426 ("a permanent physical occupation *authorized by government* is a taking without regard to the public interests that it may serve") (emphasis added). The Court's affirmative answer to that question points up the fallacy in the Federal Circuit's reasoning. Under the Federal Circuit's approach, the government could always avoid the obligation to pay just compensation simply by securing advance authorization for its seizures. But that is not, nor has it ever been, the law. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 632 (1952) (Douglas, J., concurring).[4]

It is a truism that the government, without paying just compensation, "may condemn unsafe structures, may close

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[4] Indeed, authorization is a prerequisite to a takings claim: If a governmental seizure is not authorized by law, the property owner has a claim in tort against the government official, not a constitutional claim against the sovereign. *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920).

unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas." *First English*, 482 U.S. at 325-26 n.4 (Stevens, J., dissenting); *see, e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491-92 (1987). The Federal Circuit has adopted this premise, with which no one disagrees, as its conclusion: *Every* bank and thrift seizure, the Federal Circuit has decided, falls within the government's authority to regulate business. But "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment." *Monongahela Navigation*, 148 U.S. at 336.

The very basis of cases such as these is that the thrifts were *not* "unlawful business operations" at the time of seizure. A central premise of the lawsuits brought by petitioners and *amicus* is that their thrifts would have complied with applicable law were it not for changes wrought by FIRREA—changes from which the thrifts had attempted to insulate themselves by contracts that the government breached. While banking is obviously a regulated industry, and participants in the industry accept regulation as part of the background principles pursuant to which thrifts must operate, the government "does not have unlimited power to redefine" those background principles. *Loretto*, 458 U.S. at 439; *see also Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992). Otherwise, the thrifts' "right to exclude would not be regulated, it would be eviscerated." *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994).[5]

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[5] Like the seizure of a thrift, the condemnation of a private residence is a *per se* taking of the owner's physical property. In certain circumstances (*e.g.*, where the government proves that the residence was purchased with the proceeds of illegal activity), the government may not be required to pay just compensation to the owner. But unless the government is able to carry its burden of

This Court has made it abundantly clear that if the government attempts to avoid paying just compensation on the ground that a taking is justified by some background principle that inheres in the title to the property, it bears the burden of proving the validity of such a defense. *Lucas*, 505 U.S. at 1031-32. That is because a "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). But the Federal Circuit has allowed the federal government to get away with just such an *ipse dixit* by converting a defense—the purported insolvency of the thrift—into a categorical bar on the availability of the takings remedy. This Court has repeatedly emphasized that this approach is inconsistent with the Takings Clause. *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001).

b. The Federal Circuit, reasoning that "*Loretto* simply does not fit cases . . . where the historically rooted expectations of ownership that underlie *Loretto* do not exist," has held as a matter of law that thrift owners lack a constitutionally protectable expectation of just compensation for the seizure of their property. *California Housing*, 959 F.2d at 959-60; *see also Golden Pacific*, 15 F.3d at 1074. This special rule for the thrift industry conflicts with settled takings law.

In *Preseault* v. *United States*, 100 F.3d 1525, 1539-40 (Fed. Cir. 1996), the en banc Federal Circuit expressly rejected, in a case involving a taking of land, the notion that a *per se* taking under *Loretto* may be found only after it is determined that the property owner had a "historically rooted expectation of compensation." Such a reading of *Loretto*, the

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proving that the owner has forfeited his ownership rights by violating some established rule that inheres in the title to the property, the Constitution requires the government to pay for the fair value of the property taken. There is no basis in this Court's takings jurisprudence for applying any different rule to thrift seizures.

Federal Circuit explained, "stand[s] the law on its head." *Id.* at 1540. Nevertheless, the Federal Circuit has continued, even after *Preseault*, to mechanically apply the holding of *California Housing* and its progeny to cases involving bank and thrift seizures. *See, e.g., Bailey*, 341 F.3d at 1347; *Castle*, 301 F.3d at 1341. It has thus refused to rely on *Loretto* solely in the context of the financial services industry, for a reason that the en banc court has expressly rejected for all other property owners. Review by this Court is warranted to both reaffirm the holding of *Loretto* and to ensure that the Federal Circuit affords owners of financial institutions the same constitutional protections it affords to owners of other types of property.

c. The Federal Circuit has also accepted the bare existence of federal regulation as justification for wholesale seizures of financial institutions. *See California Housing*, 959 F.2d at 959 ("Given [the] long history of government regulation of savings and loan associations, [plaintiffs] were certainly on notice that [the thrift] might be subjected to different regulatory burdens over time"). But in our modern society, some entity of state or federal government regulates virtually all businesses—not only banks, but law firms, autobody shops, accountants, hairdressers, and so forth. The Federal Circuit's rule improperly "conflates the scope of [the government's regulatory] power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution." *Preseault v. ICC*, 494 U.S. 1, 23 (1990) (O'Connor, J., concurring). Whether applied across the board or only to banks, the Federal Circuit's rule conflicts with this Court's precedents.[6]

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[6] This Court has held, for example, that even "pervasively regulated businesses" are entitled to the protections of the Fourth Amendment. *New York* v. *Burger*, 482 U.S. 691 (1987). There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the . . . Fourth Amendment,

It is well-established that "[t]he scope of the [government's] authority to regulate ... is an issue quite distinct from whether [its] exercise of [that authority] effected a taking." *Preseault*, 494 U.S. at 22 (O'Connor, J., concurring); *see, e.g.*, *Sinking-Fund Cases*, 99 U.S. 700, 719-20 (1878) (recognizing that a railroad's property could be taken within the meaning of the Fifth Amendment although the railroad was "a creature of the United States," "created for public purposes," "to a large extent devoted to public uses" and "subject to legislative control"); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-73 (1979) (explaining that "while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act," it does not follow that no taking has occurred). The Federal Circuit, by confusing the two issues, has erroneously deprived thrift owners of a remedy guaranteed to them by the Constitution.

d. The Federal Circuit's final ground for rejecting *Loretto* was that "[i]n exchange for the benefit of federal deposit insurance, [the thrift] gave the government the right, among other rights, to place [it] in conservatorship or receivership when warranted." *California Housing*, 959 F.2d at 959.

Under some circumstances, the government may expressly condition the grant of benefits on a surrender of property rights. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984). But merely by acquiring regulated property, thrift owners do not consent to its seizure. *See, e.g.*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 833 (1987) ("the announcement that the application for (or granting of) [a building] permit will entail the yielding of a property interest cannot be regarded as establishing the type of voluntary 'ex-

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should be relegated to the status of a poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392.

change'" that would allow an uncompensated taking); *Loretto*, 458 U.S. at 439 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"). Even if the benefits of regulation were relevant, the government would have to carry its burden of proving in each particular case that no just compensation is due because the value of the benefit conferred outweighs the cost of seizure.[7]

3. The reasoning of the *California Housing* line of cases has led to its own *per se* rule in the Federal Circuit: The seizure of thrifts can *never* be a taking and is not even to be analyzed under the *Loretto* framework. *See, e.g.*, *Bailey*, 341 F.3d at 1346-47; *Castle*, 301 F.3d at 1341; *Branch*, 69 F.3d at 1575; *Golden Pacific*, 15 F.3d at 1073-74; *AmBase*, 58 Fed. Cl. at 50. That conclusion warrants review by this Court.

A thrift seizure is a prototypical physical occupation. On the appointed day, federal agents typically storm the building just before opening or just after closing, and order all employees to leave. They then secure the files, vault, and computer systems, and lock the doors to prevent anyone from entering. The physical property and its operations are then turned over to a government entity (as conservator or re-

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[7] In this regard, the court also would have to weigh the benefits conferred by private owners on the government. In the 1980s, thrift acquirers saved the government billions of dollars by averting thrift closures. With respect to Carteret, for example, FSLIC saved $180 million when Carteret acquired four failing thrifts, thus averting their closure. The government's only "payment" for that benefit was the promises that it subsequently repudiated. Through these lawsuits, petitioners, *amicus*, and others are seeking nothing other than compensation for benefits previously conferred, and advantages previously promised, by the government. The government, by contrast, seeks to avoid any financial responsibility notwithstanding its breach of trust.

ceiver) for liquidation, or sale. In a single day, the owners' property interests—worth millions of dollars before the government's arrival—are eradicated. If the government's occupation of a laundry or coal mine constitutes a physical taking (and this Court has held that they do), it is difficult to conceive of a thrift seizure as anything other than a *per se* taking.

4. Even if the Federal Circuit were correct that the *Loretto* rule does not apply in the context of thrift seizures, that would not end the inquiry. Thrift owners, like petitioners and *amicus*, whose property was seized solely on the basis of a change in the regulatory regime, should be afforded the opportunity to prove a regulatory taking under the three-part approach articulated in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). But as explained in the petition (at 20-30), the Federal Circuit has also erred in its analysis of thrift seizures under the regulatory taking doctrine, effectively adopting yet another *per se* rule that FIRREA effected no regulatory takings regardless of the circumstances of particular cases. *See Bailey*, 341 F.3d at 1347 ("the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking") (quoting *Castle*, 301 F.3d at 1341).

The Federal Circuit's approach to regulatory taking cases simply ignores the fact that FIRREA worked a wholesale evisceration of contracts expressly designed to protect thrifts and their owners from precisely the type of regulatory change that Congress wrought in 1989. As a result, the line of Federal Circuit cases is irreconcilable with this Court's explicit recognition that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *see also De Laval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 71 (1931) (cancellation of a government contract "is an exercise of the power of eminent domain, and

the liability of the government is for just compensation").[8] The Federal Circuit's approach also cannot be reconciled with this Court's recognition that governmental promises can result in reasonable, investment-backed expectations, the frustration of which gives rise to a takings claim. *Monsanto*, 467 U.S. at 1011; *Kaiser Aetna*, 444 U.S. at 179-80. And the Federal Circuit, by refusing to hold the government liable for just compensation notwithstanding the total elimination of thrift owners' property rights, has failed to heed the "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Its regulatory taking analysis in thrift cases is thus as unmoored from this Court's precedents as is its refusal to apply *Loretto* in this context.

The Federal Circuit, in short, has left petitioners, *amicus*, and owners of other seized thrifts with no recourse under the Fifth Amendment. This conclusion, as exemplified by the decision below, violates numerous core precepts of this Court's takings jurisprudence. The Federal Circuit has so far departed from the accepted course of constitutional adjudication that this Court's review is warranted. Otherwise, prop-

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[8] The Court of Federal Claims suggested that the Takings Clause has no application where there also exists a contract between the claimant (or a related entity) and the government. 58 Fed. Cl. at 51. To the extent the government reiterates that argument here, it is wrong for the reasons stated in the Brief for John K. Castle et al. as Amici Curiae Supporting Petitioners, *Franconia Assocs.* v. *United States*, No. 01-455 (Feb. 2002), at 6-23. Even where a contractual remedy exists, the Takings Clause remedy remains available to "cove[r] any shortfall between [the alternative] remedy and just compensation." *Monsanto*, 467 U.S. at 1018; *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156 (1974); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-95 (1985). Where a contractual remedy is unavailable—for whatever reason—the government's constitutional obligation to pay just compensation is undiminished.

erty owners will continue to be denied the remedy that the Constitution expressly confers upon them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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